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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
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COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

ANTHONY L. ALLEN, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

BRIEF OF RESPONDENT

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I.

ISSUE PRESENTED

Did the trial court abuse its discretion in denying the defendant's motion for post-adjudication DNA testing?

II.

STATEMENT OF THE CASE

This matter is back before the Court on appeal by defendant of the trial court's denial of his motion for post-adjudication-DNA testing pursuant to RCW 10.73.170. Here, defendant sought additional testing of the blade and handle of the knife found at the crime scene next to the semi-conscious Mr. Hudson. The knife Mr. Hudson told Officer Baldwin he had wrestled away from the defendant. RP 205. The defendant sought the additional testing as a means of supporting his claim at trial that he did not handle the knife at any time.

III.

RELEVANT FACTS

Initially, it is important to note that appellant's recitation of relevant facts is rather curtailed as compared to that established by this Court in its unreported decision affirming defendant's convictions. *State v. Allen*, No. 26978-7, *slip op.* (Div III. Sept. 22, 2009). Therein this Court summarized the evidence as follows:

Karla Jones and Dewey Hudson Jr. went to Mr. Hudson's home at his suggestion to retrieve her dog. She reached the porch on Mr. Hudson's home. Anthony Allen then opened the door, grabbed Ms. Jones, and pulled her into the entryway. Mr. Allen and another man then started punching her in the face. Mr. Hudson tried to intervene. Mr. Allen knocked him down, slapped him in the face with a butcher knife, and hit him in the jaw with the butt of the butcher knife. Mr. Allen next used the butcher knife to cut off Ms. Jones's hair while a woman was kicking Ms. Jones in the side. Then Mr. Allen hit Ms. Jones in the back of the head with a pistol, and the three assailants left Mr. Hudson's house. Mr. Hudson pleaded with Ms. Jones not to call the police. But Ms. Jones got her dog, ran home, and called police.

Officer Eugene Baldwin arrived at Ms. Jones's house less than 10 minutes after she called 911. He noticed injuries to Ms. Jones's head and face. And Ms. Jones told him that she and Mr. Hudson had been assaulted by Mr. Allen and another man.

Officer Baldwin then went to Mr. Hudson's home. He found Mr. Hudson in the living room, apparently unconscious, and noticed that his face was swollen and bloody. Mr. Hudson first told the officer that nothing had happened but then later reported that he and Ms. Jones had been assaulted. He told Officer Baldwin that Mr. Allen hit him in the face and head with a handgun when he tried to stop Mr. Allen from assaulting Ms. Jones. Officer Baldwin recovered a butcher knife from the house.

The State charged Mr. Allen, in relevant part, with first degree kidnapping and two counts of second degree assault for allegedly kidnapping and assaulting Ms. Jones and for allegedly assaulting Mr. Hudson "with a deadly weapon, to-wit: a handgun." ...

Mr. Hudson testified at trial. He did not remember talking to Officer Baldwin and denied being assaulted by Mr. Allen. He said that his injuries resulted from trying to get Ms. Jones out of his house.

In response to the State's questions about what Mr. Hudson had told him, Officer Baldwin later testified:

I basically explained to [Mr. Hudson] how bad Karla had been beaten up, and that seemed to trigger in [Mr. Hudson's] own mind how important it was to tell the truth about what had happened, and so he began telling me mostly what had occurred at his house.

....

He said that [Mr. Allen and another man] were beating up Karla real bad. He said that he tried to get in the middle of it and stop them ... [and] that [Mr. Allen] had hit him with a small caliber frame, small framed handgun that he had, and he said he was hit several times, and he, also, lost consciousness.

Id., No. 26978-7 at 1-2; RP 121807 at 202-204.

It is this body of evidence into which the trial court incorporated the projected results of the post-adjudication DNA testing to determine whether defendant qualified for such testing.

The trial court also reviewed a trial record that included defendant's proffered theory of the case. In the opening statement at trial, defense counsel conceded to the jury that defendant, with Uriah Allen, physically intervened to break up the fight between Karla Jones and Wanda Phillips. RP 58. The jury was advised that the defendant's theory of the case was that the defendant participated in the physical ejection of Ms. Jones from Mr. Hudson's home, yet was not armed and did not perpetrate the injuries to Ms. Jones or Mr. Hudson. RP 58-59.

In support of the motion, defendant argued to the trial court that the DNA results from the knife would necessarily exculpate defendant. Defendant claimed that the DNA results would significantly impact the body of evidence because Ms. Jones was the only witness who placed a knife in the defendant's hands

during the assault. However, the record before the jury included Mr. Hudson's statement to Officer Baldwin identifying the defendant as the one who had the knife that he wrestled away from defendant and that it was still there on the floor of the crime scene. RP 205. This was direct evidence from Mr. Hudson properly offered and admitted through Officer Baldwin. Additionally, any potential biological evidence that might have existed on the handle of the knife was most likely either removed or contaminated when the handle was processed for fingerprints. Accordingly, the record before the jury reflected that any DNA analysis of the knife handle or blade would have been unnecessary, inconclusive, or contaminated.

As noted, the trial court was tasked by statute and case law to factor in the potential DNA results to the body of evidence produced during the trial. The trial court specifically noted that it was required to grant the motion when exculpatory results would, *in combination with the other evidence*, raise a reasonable probability the petitioner was not the perpetrator. CP 158-161 (*citing State v. Riofta*, 166 Wn.2d 358, 209 P.3d 467 (2009)). The trial court reviewed the body of evidence produced at trial and incorporated DNA results as suggested by the defendant's motion in rendering its decision. Included in that body of evidence were the facts that: the knife came from Mr. Hudson's kitchen where it could have been used by many people before the incident, including defendant in light of his relationship with Mr. Hudson; there was no evidence that defendant

had been stabbed or even nicked with the knife so there could be no probability that the presumed blood on the blade was that of defendant; and the only participant who shed blood during the incident was Ms. Jones. CP 158-161 (*citing* to RP 195-196). Accordingly, the trial court denied the motion and concluded that any DNA results from testing the knife would be insufficient to satisfy the statutory standard of “innocence on a more probable than not basis” created by RCW 10.73.170. CP 158-161. Defendant timely appealed the trial court’s denial of his motion.

IV.

ARGUMENT

A. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING DEFENDANT’S MOTION FOR POST-ADJUDICATION DNA TESTING.

As pointed out to the trial court, the amendment of RCW 10.73.170 was enacted in 2005, defendant’s trial was completed in 2007 and he was sentenced in early 2008, yet defendant did not file the motion with the trial court seeking additional DNA testing until another 4 years had passed. Nevertheless, the defendant failed to satisfy the threshold burden of proof to qualify for the requested post-conviction DNA testing.

A condition precedent to the trial court granting the motion for DNA testing was that it determines whether defendant has satisfied the statutory and case law

requirements to support the motion. RCW 10.73.170 conditions the availability of the motion upon the defendant's proving that "the likelihood that the DNA evidence would demonstrate innocence" is more probable than not. The trial court based its denial of the motion on the holding and reasoning set out in *State v. Riofta, supra*. Therein the Supreme Court held that RCW 10.73.170(3) sets an "onerous" standard of proof for a defendant seeking DNA testing post-conviction. *Riofta*, 166 Wn.2d at 367.

In *State v. Thompson*, 173 Wn.2d 865, 271 P.3d 204 (2012), the Supreme Court examined the requirements of RCW 10.73.170 in the context of the fact that the trials in *Thompson* and *State v. Gray*, 151 Wn. App. 762, 215 P.3d 961 (2009), focused on sexual assaults wherein the identity of the perpetrator was limited to one individual. In both of those cases the DNA evidence would provide definitive corroboration of the perpetrator because of the nature of the crimes and the biological samples. Hence, the Supreme Court determined that those cases were distinguishable from its holding in *State v. Riofta, supra*, where the focus of the DNA motion was an item that "may have been handled by other people prior to the incident, making it possible that DNA could be left at the crime scene by someone other than the shooter." *State v. Thompson*, 173 Wn.2d at 874-875.

As noted, RCW 10.73.170 requires the defendant establish that DNA evidence would provide significant new information before a post-adjudication motion for such testing can be granted. If a defendant satisfies that threshold

burden, the defendant must then prove that the DNA evidence would prove his innocence on a more probable than not basis. Here, defendant's characterizations of the evidence before the jury narrowly contended that the only evidence tying defendant to the knife was Ms. Jones, yet Mr. Hudson tied defendant to both the knife and a struggle for control thereof. Defendant contended below that Mr. Hudson's statements to Officer Baldwin constituted only impeachment evidence only, yet those statements were admitted at trial as substantive evidence pursuant to ER 803(a)(1) as present sense impressions and 803(a)(2) as excited utterances. The record before the jury included that Mr. Hudson reiterated to Dr. Richardson while being treated at the hospital that he was assaulted at his residence by several individuals who struck him with the butt of a gun. Those statements were admitted at trial under ER 803(a)(4) as made for purposes of facilitating medical diagnosis and corresponding treatment.

Defendant's arguments in support of this motion focused on distinguishing or reinterpreting evidence that was already weighed by the jury in rendering its verdicts. Such is not the standard for evaluating the validity of a post-conviction motion for DNA testing. The defendant must prove DNA evidence will establish his actual innocence on a more probably than not basis. The intent of the Legislature in amending RCW 10.73.170 was not to provide defendants with a post-conviction vehicle to re-litigate the facts already determined by the trier of fact.

- i. Defendant Did Not Show That DNA Evidence Would Prove His Innocence On A More Probable Than Not Basis When Combined With The Body Of Evidence Produced At Trial.

Defendant claimed, and appellant maintains, that if his blood is found on the blade then it would prove that he was the victim of the assaults. However, appellant specifically testified that at no point in time was he involved with the knife or more than peripherally in contact with Ms. Jones or Mr. Hudson. RP 308-311; 314-317. Nor did appellant indicate that he was sliced, stabbed, or in any manner injured to the extent that his blood should be expected to be on the knife. RP 308-311; 314-317. Instead, the record includes Officer Baldwin's observations of bleeding on Ms. Jones' head in the areas where the attackers used the knife to cut off chunks of her hair. RP 196. Finally, it is unlikely that there is any biological sample left on the handle of the knife since none was observed by Forensic Scientist Dewey when she prepared the knife for latent fingerprints. RP 205. At trial Ms. Dewey testified that she carefully inspected the knife handle for trace evidence such as hairs or fibers or substances that may need to be collected. RP 205. Defendant provided the trial court with no evidence that the red substance on the knife blade could provide any relevant exculpatory evidence since defendant's theory of the case was that he never touched the knife, and was neither cut nor injured in any manner during the incident because he barely touched anyone. The trial court found that post-conviction DNA testing of the red substance and the knife handle could not provide significant new

evidence that would exculpate defendant. The record reflects that forensic processing of the knife found no significant trace evidence prior to processing the handle for fingerprints, so it is even less likely that such evidence still existed on the handle after it was processed for latent fingerprints.

Defendant asked the trial court to accept a shift in his trial defense theory from his never touching the knife to that he was injured by the knife based upon the *possibility* that his DNA could be found on the knife. Defendant asked the trial court to resolve his motion by speculation without significant new evidence in light of a new defense theory. On appeal, appellant asks this Court to find that the trial court abused its discretion in reviewing the body of evidence produced at trial and factoring in the most favorable possible results from the proposed DNA-testing. A trial court abuses its discretion when its decision is manifestly unreasonable, when it exercises its decision on untenable grounds, or when it makes its decision for untenable reasons. *State v. Blackwell*, 120 Wn.2d 822, 830, 845 P.2d 1017 (1993). Here, the trial court carefully reviewed the record and determined that the DNA results sought by defendant would not impact the body of evidence to thereby prove that defendant was innocent on a more probably than not basis. CP 158-161.

- ii. Defendant Did Not Prove That DNA Testing Was Appropriate Per RCW 10.73.170.

Defendant/Appellant contended below that he was entitled to DNA testing of the red substance recovered from the knife blade and handle because it would yield

significant new information. Defendant postulated that the DNA results from the knife might produce a profile that would identify the true perpetrator of the assaults.

In *State v. Riofta*, the Court noted that RCW 10.73.170 created a two-step procedure for the trial court to determine whether the defendant has met the statutory burden of proof to qualify for post-conviction DNA testing. First, the court must determine whether the defendant's motion satisfies the statutory procedural requirements for testing. *Id.* at 365. The Supreme Court observed:

The...statute allows DNA testing based on either advances in technology *or* the potential to produce significant new information...Even before the 2005 amendment, RCW 10.73.170 provided a basis to request post-conviction DNA testing where 'significant new information' was unavailable at trial due to inferior technology...Thus, if 'significant new information'...means anything, it means something more than DNA evidence that could have been obtained at trial...Read as a whole, the statute provides a means for a convicted person to produce DNA evidence that the original fact finder did not consider whether because of an adverse court ruling, inferior technology, or the decision of the prosecutor and defense counsel not to seek DNA testing prior to trial.

Id., 166 Wn.2d at 365-366.

Here, defendant did not prove to the trial court that the DNA evidence sought by his motion would prove him more probably than not innocent of the crimes for which he was convicted.

As noted, in *State v. Thompson*, the Supreme Court examined the requirements of RCW 10.73.170 in the context of the sexual assault trials in *Thompson* and *Gray*, where there was only one possible perpetrator due to the nature

of the biological material. Both cases involved the situation where the DNA evidence would provide definitive corroboration of the perpetrator. Hence, the Supreme Court determined that those cases were distinguishable from its holding in *State v. Riofta, supra*, where the focus of the DNA motion was an item that “may have been handled by other people prior to the incident, making it possible that DNA could be left at the crime scene by someone other than the shooter.” *State v. Thompson*, 173 Wn.2d at 874-875.

Here, defendant focused his DNA motion on an item that most likely was handled by multiple people prior to the incident which would render it less than a reliable vehicle for exculpatory evidence. The nature of the subject item here brings this case more appropriately under the analysis of the Court in *State v. Riofta, supra*.

In *Riofta*, the Supreme Court held that if a motion satisfies the procedural requirements, the Court must determine whether the motion satisfies “the substantive requirement of the statute.” *State v. Riofta*, 166 Wn.2d at 367. The Supreme Court identified the second step as being “onerous.” *Id.*, at 367. The Supreme Court observed:

RCW 10.73.170(3) provides:

The court shall grant a motion...under this section if such motion is in the form required by subsection (2)...and the convicted person has shown the *likelihood that the DNA evidence would demonstrate innocence on a more probable than not basis.*

Id. at 367.

Thereafter, the Supreme Court held that Mr. Riofta had not satisfied the substantive requirements of the statute and hence did not qualify for the requested DNA testing. Specifically, the Supreme Court concluded:

RCW 10.73.170 allows a convicted person to request DNA testing *if* he can show the test results would provide new material information relevant to the perpetrator's identify. However, a trial court must grant the motion *only* when the petitioner has 'shown the likelihood that the DNA evidence would demonstrate innocence on a more probable than not basis.' RCW 10.73.170(3).

In this case, the trial court properly concluded Riofta failed to satisfy the statutory standard, considering the strength of the eyewitness identification, the evidence of motive, and the limited probative value of the DNA evidence sought. (Emphasis added)

Id., at 373.

Here, defendant asked the trial court to conclude that the results of the requested DNA testing combined with all the other evidence produced at trial would make it more probable than not that he is actually innocent. Assuming, *arguendo*, that the requested testing did not find defendant's DNA on the knife blade or handle, such would not necessarily constitute new significant evidence. Such a result would not exculpate defendant since he would still be guilty if any of his accomplices were armed with, or used, the knife. Neither would a positive DNA result on the knife necessarily constitute new significant evidence since the presence of defendant's DNA on the knife was not a factor during the trial. Defendant argued to the jury that he did not commit the charged crimes, yet the jury weighed the credibility of the evidence produced and returned verdicts of guilty as charged. Defendant failed to

prove that the DNA testing sought by his motion would produce any new significant material which, when combined with the existing body of evidence, would make it more probable than not that he was innocent. Accordingly, the State respectfully submits that the trial court did not abuse its discretion in denying the defendant's motion for DNA testing pursuant to RCW 10.73.170.

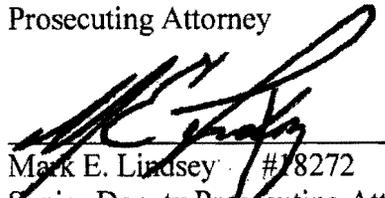
V.

CONCLUSION

The trial court did not abuse its discretion in denying the defendant's post-adjudication motion for DNA testing, so the State respectfully requests that the trial court's order be affirmed.

Respectfully submitted this 30th day of October, 2013.

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